is given under an erroneous belief of ownership,[9] goes to show that it is wholly independent of the testator's intention.[10] That it rests on the broad principle that he who seeks equity must do equity, seems therefore the preferable view.[11]

Two exceptions to the general rule have been recognized by the courts. The first is where a will, defectively executed as to lands belonging to the testator, contains a valid gift to the heir. Before the modern statutes this raised the question of an election by the heir between the legacy and the lands rightfully his by descent. When the devise of realty was inoperative because of the Statute of Frauds, it was uniformly held that the heir need not elect;[12] for the courts hesitated to accomplish indirectly, by compelling an election, a result which the Statute prevented the testators accomplishing directly; they therefore refused to look at the will for the purpose of raising an election. Like considerations were applicable where the will was ineffectual to dispose of after-acquired land; yet in such a case the heir was put to his election.[13] And in a situation possible at the present time as well as under early statutes, namely, where the devise was inoperative because the lands in question were situated in a foreign jurisdiction, a like result was reached.[14]

The second exception was made in the case of the will of an infant. Because of the testator's incapacity such an instrument, inoperative under the early law as to land, but valid as to a gift of personalty, was regarded as insufficient to put the heir to his election.[15] On the ground that there must always be personal competency, a leading writer brings within this exception the will of a married woman.[16] But his view finds little support.[17] However it may have been in former times, under modern statutes giving married women full power to acquire, hold, and dispose of property, there is no reason not to apply the general rule of election. Accordingly, where, under the English Married Women's Property Act,[18] a married woman bequeathed to a stranger property belonging to her husband, and in the same will left the husband an annuity from her separate estate, the husband was compelled to elect. *In re Harris*, 1909, 2 Ch. 206.

THE CONCURRENT JURISDICTION OF THE FEDERAL AND STATE COURTS. — Congress having provided for the exercise of the judicial power of the

[9] Whistler *v.* Webster, 2 Ves. Jr. 366; Barrier *v.* Kelly, *supra.*

[10] Haynes, Outlines of Equity, 5 ed., pp. 263, 265. The only intent necessary is merely an intent to dispose of property in fact not the testator's own. Cooper *v.* Cooper, 7 L. R. H. L. 53, 70; Havens *v.* Sackett, 15 N. Y. 365.

[11] Peters *v.* Bain, 133 U. S. 670, 695; 1 Pom. Eq. Jur., 3 ed., § 465.

[12] Sheddon *v.* Goodrich, 8 Ves. Jr. 481; Melchor *v.* Burger, 1 Dev. & B. (Eq.) 634. But if an express condition was attached to the gift of personalty the heir was compelled to elect. Boughton *v.* Boughton, 2 Ves. 12 (a distinction much criticized). See Melchor *v.* Burger, *supra.*

[13] Thellusson *v.* Woodford, 13 Ves. Jr. 209; McElfresh *v.* Schley, 2 Gill (Md.) 181. *Contra*, City of Phila. *v.* Davis, 1 Whart. (Pa.) 490.

[14] Brodie *v.* Barry, 2 Ves. & B. 127; Van Dyke's Appeal, *supra.*

[15] Hearle *v.* Greenbank, 1 Ves. 298.

[16] 2 Jarman, Wills, 5 Am. ed., § 9.

[17] *In re* Burgh Lawson, 34 W. R. 39. But see Coutts *v.* Acworth, L. R. 9 Eq. 519. In Rich *v.* Cockell, 9 Ves. Jr. 369, often cited for this view, the point is left undecided. See also Blaiklock *v.* Grindle, L. R. 7 Eq. 215, 219.

[18] 45 & 46 Vict. c. 75, § 1 (1882).

United States over controversies between citizens of different states, without limitation as to the nature of the controversy,[1] the federal courts sitting within a state construe the constitution and statutes and interpret the common law of that state. To guarantee the supremacy of the sovereign state, the Judicature Act provides that the laws of the several states shall be regarded as rules of decision in the federal courts.[2] But, as this Act has been held not to include the laws of a state in the sense that precedents established by judicial decisions are laws,[3] the federal courts are not bound to follow the decisions of the state courts. Indeed, if they were so bound, the purpose of this jurisdiction, namely, to prevent a possible bias in the state courts against a citizen of another state, would be destroyed.

Nevertheless, the inconvenience of having two interpretations of the law in the same territory early led the federal courts to follow the decisions of the local courts.[4] And this practice might have become universal had not a later federal decision made an exception on grounds of expediency in regard to questions of commercial law.[5] As a result, two opposed and well-defined principles have been recognized by the federal courts as controlling their treatment of the decisions of state courts. Thus decisions by a state court which interpret the state constitution and statutes,[6] or constitute any rule of property,[7] or cover any matter of local regulation,[8] are accepted as binding. In such matters the federal courts will reverse their own decisions after a ruling by the local court;[9] the Supreme Court will follow a state decision made after the case has been decided in the circuit court;[10] and any undecided question will, if possible, be left to the state court.[11] On the other hand, state precedent is not controlling in matters of commercial[12] or general law.[13] So, in a recent case when a state court had interpreted a will differently from the circuit court, the decision of the state court was not followed when the case came again before the federal court on a second writ of error. *Messinger* v. *Anderson*, 171 Fed. 785 (C. C. A., Sixth Circ.). A further exception to the general policy of agreement with the state courts is well established; when a contract is made by a foreign citizen under a state statute which has been held constitutional by a decision subsequently overruled, the federal courts will follow the earlier view of the state court.[14] But this seems nothing more than an effective use of the discretion placed in the federal courts to prevent any injustice to foreign citizens.[15]

As a result, however, of the exercise of discretionary jurisdiction by the

---

[1] 18 U. S. Stat. L. 470.
[2] 1 U. S. Stat. L. 92.
[3] See 22 HARV. L. REV. 611.
[4] Brown *v.* Van Braam, 3 Dall. 344.
[5] Swift *v.* Tyson, 16 Pet. 1.
[6] Fairfield *v.* County of Gallatin, 100 U. S. 47; Merchants Bank *v.* Pennsylvania, 167 U. S. 462.
[7] Suydam *v.* Williamson, 24 How. 427.
[8] See Burges *v.* Seligman, 107 U. S. 20, 33.
[9] Southern Ry. Co. *v.* North Carolina Corporation Comm., 99 Fed. 162.
[10] Moores *v.* National Bank, 104 U. S. 625.
[11] Pelton *v.* National Bank, 101 U. S. 143.
[12] Swift *v.* Tyson, *supra*.
[13] Clarke *v.* Bever, 139 U. S. 96, 117. As, for example, the interpretation of the fellow-servant doctrine. Baltimore *v.* Ohio Ry. Co. *v.* Bough, 149 U. S. 368.
[14] Great Southern Fire Proof Hotel Co. *v.* Jones, 193 U. S. 532.
[15] See 4 HARV. L. REV. 311, 8 *ibid.* 328. As to the right of a state court to alter its own decisions, see 22 HARV. L. REV. 182.

United States courts, the idea has been advanced that there is a federal common law.[16] But any such law would be exercised over the territory of the states, and in a given territory there can be but one law in existence at one time. That law, even though subject to alteration by two distinct sovereigns, as in this country where a federal statute changes the law of every state, must nevertheless be the law of the territory or state. And it is consequently the state law which the federal courts are interpreting.[17] That federal decisions are followed in disregard of state court decisions does not argue the existence of a federal common law, but is simply an illustration of the essential feature of the common as distinct from the civil law — the authority of precedent.

MUTUAL EXCLUSIVENESS OF THE BUYER'S REMEDIES FOR BREACH OF WARRANTY IN SALES OF PERSONALTY. — It is almost universally recognized that for the sellers breach of warranty the buyer has two remedies: an action or counterclaim for damages on the contract,[1] and recoupment in a suit for the purchase price.[2] Rescission is also allowed by a number of States,[3] although denied by about an equal number[4] and by the English courts.[5] An interesting question is the consistency of these remedies. In a recent case in a jurisdiction where rescission is allowed, it was held that even under a code system of pleading a buyer cannot recover consequential damages when the case has been tried on the basis of rescission. *Houser & Haines Mfg. Co.* v. *McKay*, 101 Pac. 894 (Wash.). This decision goes on the ground that the remedies by rescission and by suit on the contract are inconsistent; and that therefore the doctrine of election allows the pursuit of one only.[6]

The doctrine of election of remedies is based not on strict estoppel but on a distinct principle of public policy which requires that a defendant shall not be subjected to two inconsistent actions when the plaintiff is amply protected by one.[7] It does not apply, however, where a prior suit has been brought in ignorance of material facts,[8] or has been defeated either because brought before accrual of the right of action,[9] or because incompatible with the facts of the case.[10] But two actions, properly brought, of which one relies upon the existence of a contract and the other upon its disaffirmance,

---

[16] A federal common law was also supposedly established by certain regulations of interstate commerce. See 15 HARV. L. REV. 224.

[17] For a concurring view of this problem arising under the Australian Constitution, see Clarke, Australian Constitutional Law, p. 194.

[1] Mondel *v.* Steel, 8 M. & W. 858; Underwood *v.* Wolf, 131 Ill. 425.

[2] Poulton *v.* Lattimore, 9 B. & C. 259.

[3] Bryant *v.* Isburgh, 79 Mass. 607.

[4] Freyman *v.* Knecht, 78 Pa. 141.

[5] Street *v.* Blay, 2 B. & Ad. 456; 15 HARV. L. REV. 148; 14 *ibid.* 327. Rescission is not allowed by the Sales of Goods Act. Sales of Goods Act, § 53 (1).

[6] See Thompson *v.* Howard, 31 Mich. 309.

[7] See Emma Silver Mining Co. (Ltd.) *v.* Emma Silver Mining Co. of N. Y., 7 Fed. 401, 419.

[8] Goodger *v.* Finn, 10 Mo. App. 226.

[9] Edgewood Distilling Co. *v.* Shannon, 60 Ark. 133.

[10] McLaughlin *v.* Austin, 104 Mich. 489.